Supreme Court, U.S.
FILED
061646 JUN 11 2007
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia*, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i). The question presented is:

Whether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2000 & Supp. IV 2004).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 464 F.3d 1072. The sentencing order of the district court (App., *infra*, 18a-28a) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (App., *infra*, 29a-30a). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007. On May 2, 2007, Justice Kennedy further ex-

tended the time to June 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The relevant provisions of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), and of Washington's controlled-substances law are reproduced at App., *infra*, 31a-36a.

STATEMENT

Following a jury trial, respondent was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). At sentencing, the district court declined to impose an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA). Respondent instead was sentenced to 92 months of imprisonment, to be followed by three years of supervised release. The government appealed, and the court of appeals affirmed.

1. The ACCA mandates a minimum term of 15 years of imprisonment, and authorizes a maximum term of life imprisonment for anyone who has been convicted of being a felon in possession of a firearm and who has three previous convictions for "a violent felony or * * * serious drug offense, or both." 18 U.S.C. 924(e)(1) (Supp. IV 2004). The ACCA defines "serious drug offense" to include certain state-law controlled substance offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

2. a. Respondent has several state-law felony convictions, including two California convictions for burglary and three convictions in Washington State for delivery of a controlled substance. App., *infra*, 2a, 4a-5a. Upon his release from prison in Washington, respondent was placed on a term of community supervision, from

which he absconded. In April 2003, respondent was apprehended, and a search of respondent incident to arrest uncovered a bag of heroin and approximately $900 in cash. *Id.* at 2a-3a. In a subsequent search of the residence in which respondent was residing, officers found a semi-automatic pistol. *Id.* at 4a; Gov't C.A. Br. 12.

A grand jury in the Eastern District of Washington returned a one-count indictment charging respondent with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (2000 & Supp. IV 2004). Respondent was convicted following a jury trial. App, *infra*, 4a.

b. At sentencing, the government argued that, although respondent's felon-in-possession offense ordinarily carried a maximum sentence of ten years, the designation of respondent as an armed career criminal triggered a minimum sentence of 15 years, and a maximum life sentence, pursuant to 18 U.S.C. 924(e) (2000 & Supp. IV 2004). As predicate offenses for respondent's armed career criminal status, the government relied on respondent's prior burglary and controlled substance convictions. App., *infra*, 20a-23a.

With respect to each of the three prior drug offenses, respondent had been convicted of violating Revised Code of Washington § 69.50.401 (1994), which prohibits the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance. App., *infra*, 10a. For each offense, he had pleaded guilty to "Delivery of a Controlled Substance Narcotic from Schedule III-V," which is a class C felony. C.A. Supp. E.R. 128, 147, 182.

Under Washington law, a class C controlled-substances felony is generally punishable by a maximum sentence of five years. Wash. Rev. Code

§ 9A.20.021(1)(c) (1994). Under Washington's controlled substances law, however, "[a]ny person convicted of a second or subsequent [drug] offense" faces a maximum sentence that is double the term otherwise authorized, making the maximum sentence for a class C felony ten years. *Id.* § 69.50.408(a) and (b).[1] Because of his repeated drug convictions, three of respondent's drug offenses constituted "second or subsequent offense[s]" that subjected him to a ten-year maximum sentence under Washington law. See C.A. Supp. E.R. 129, 148, 183.

The district court denied the armed career criminal enhancement. The court agreed with the government that both of respondent's burglary convictions constituted "violent felonies" under the ACCA. App., *infra*, 5a, 20a-22a; see generally *Taylor* v. *United States*, 495 U.S. 575 (1990). The district court rejected, however, the use of respondent's Washington controlled substance convictions as predicates for an ACCA enhancement. Relying on *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the district court held that the "maximum term of imprisonment" for each

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[1] The Revised Code of Washington § 69.50.408(a) and (b) (1994) provides:

> (a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.
>
> (b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

of the drug convictions had to be determined without reference to the recidivist sentencing provision. App., *infra*, 5a, 11a, 23a-27a.

In *Corona-Sanchez*, the Ninth Circuit had addressed, for federal sentencing purposes, whether a California petty theft offense constituted an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which would increase the defendant's base offense level under Sentencing Guidelines § 2L1.2(b)(1)(A). See 291 F.3d at 1202, 1203, 1208-1211. That determination turned on whether the theft offense was punished by a term of imprisonment of "at least one year." 8 U.S.C. 1101(a)(43)(G); Sentencing Guidelines § 2L1.2(b)(1)(A). While the petty theft statute at issue in *Corona-Sanchez* provided a maximum sentence of only six months for first offenders, Corona-Sanchez, a recidivist offender, was sentenced to two years of imprisonment. *Corona-Sanchez*, 291 F.3d at 1208.

The en banc Ninth Circuit concluded that, in determining the length of the sentence for purposes of applying the unlawful-entry guideline, the state recidivism statute must be disregarded, and the court could consider only the six-month maximum that California law provided for the offense of conviction for a first offender. *Corona-Sanchez*, 291 F.3d at 1208-1209. In so holding, the court reasoned that, under *Taylor* v. *United States*, *supra*, courts were required "to examine the prior crimes by considering the statutory definetion of the crimes categorically, without reference 'to the particular facts underlying those convictions,'" and therefore the court was obligated to "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209 (quoting *Taylor*,

495 U.S. at 600). The court of appeals also considered its approach to be consistent with "the Supreme Court's historic separation of recidivism and substantive crimes." *Id.* at 1209 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Almendarez- Torres* v. *United States*, 523 U.S. 224 (1998)).

Without the ACCA enhancement, the district court imposed a prison sentence of 92 months, to be followed by three years of supervised release. See J. and Sentence, *reprinted at* C.A. E.R. 6-7.

3. The government appealed, and the court of appeals affirmed. App., *infra*, 1a-17a.[2] The court concluded that, under *Corona-Sanchez*, "when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" *Id.* at 11a (quoting *Corona-Sanchez*, 291 F.3d at 1209). The court thus considered only the five-year penalty provided for Washington class C felony convictions generally, rather than the ten-year penalty applicable to drug recidivists like respondent. *Id.* at 12a, 16a. The court acknowledged, however, that its decision conflicted with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-470 (per curiam), cert. denied, 543 U.S. 967 (2004), and was in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (2003). See App., *infra*, 16a-17a n.6.

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[2] Respondent appealed his conviction, arguing that the district court erred in denying his motion to suppress evidence and that the evidence was insufficient to support his conviction. The court of appeals affirmed the denial of respondent's motion to suppress and upheld his conviction. App., *infra*, 1a-2a, 5a-10a.

The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit applied its settled rule that recidivist enhancements to prior offenses must be disregarded in determining the maximum sentence that could have been imposed on a recidivist offender. Accordingly, the court held that respondent's prior drug-trafficking convictions were not "offense[s] * * * for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2), even though the court acknowledged that respondent could lawfully have been sentenced to ten years of imprisonment for each of his prior offenses. The court's approach is incorrect; it has been rejected by two other courts of appeals and is in tension with the analysis of a third circuit; and it has recurring importance for the proper and uniform application of the ACCA. More broadly, a variety of provisions in federal criminal and immigration law turn on the maximum punishment that was available for a prior offense of which a person was convicted. The Ninth Circuit's incorrect approach to determining the maximum punishment understates the seriousness of those prior convictions in many cases, and thus precludes accurate classification of their current legal status. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's decision.

1. The court of appeals' decision rests on an incorrect understanding of the law and this Court's precedent.

a. There is no dispute in this case that Washington law rendered respondent eligible for a maximum sen-

tence of ten years of imprisonment based on his repeated controlled-substance convictions. See App., *infra*, 10a-11a. The Ninth Circuit nevertheless disregarded that fact in applying the ACCA solely because respondent's maximum sentence for his prior state offenses was increased by his recidivism. Nothing in the ACCA justified the court's determination of the "maximum term of imprisonment * * * prescribed by law" without consideration of applicable recidivist enhancements.

The ACCA treats a federal defendant's prior drug offense as "serious" if the offense carried a maximum term of imprisonment of at least ten years "prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). On its face, Washington law prescribed a maximum sentence of ten years for respondent's drug-trafficking crimes. See Wash. Rev. Code §§ 9A.20.021(1)(c), 69.50.401, 69.50.408 (1994). The ACCA does not require that the maximum sentence rest exclusively on the elements or "facts underlying the prior offense." App., *infra*, 11a-12a n.3. Because respondent was a recidivist drug offender, the enhanced maximum sentence set forth by Section 69.50.408—and not the base maximum ordinarily provided by Section 9A.20.021(1)(c)—"prescribes [the] punishment for [his] offense." *Corona-Sanchez*, 291 F.3d at 1218 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). The ACCA refers to the real maximum "prescribed by law" for respondent's prior offenses—not to a hypothetical maximum prescribed for a first offender.

This Court has long recognized that a recidivist enhancement does not impose additional punishment for the prior crime. *Nichols* v. *United States*, 511 U.S. 738, 747 (1994). Rather, it is a "stiffened penalty for the lat-

est crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). Like many other jurisdictions, Washington has imposed just such a "stiffened penalty" for recidivist drug offenders. *Id.* at 732. Read naturally, the ACCA's phrase, "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), refers to such enhanced penalties for recidivists, which are a common feature of the criminal justice system. See *Parke* v. *Raley*, 506 U.S. 20, 26-27 (1992) (noting that all 50 States and the Federal Government provide for recidivist enhancements).

In a comparable context, this Court has read statutory language referring to a "maximum" term to take into account recidivist enhancements. See *United States* v. *LaBonte*, 520 U.S. 751 (1997). In *Labonte*, the Court considered the meaning of the phrase "maximum term authorized" in 28 U.S.C. 994(h), which directed the United States Sentencing Commission to provide for sentences close to the maximum for certain recidivist offenders. *LaBonte*, 520 U.S. at 752-753. The Sentencing Commission promulgated a "Career Offender Guideline" to implement Section 994(h) that excluded any increases based on a defendant's prior convictions from the "maximum term authorized" for an offense. *Id.* at 754-755. This Court held that the Commission's action was inconsistent with the statute's text, reasoning that, "[w]here Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term." *Id.* at 759. The same statutory analysis applies here. When Congress in the ACCA referred to the "maximum term of imprisonment," it meant the maximum term including

any recidivist enhancements for which an offender qualified, not to a base, unenhanced term.

b. In holding otherwise, the court of appeals misread this Court's precedent. The court relied principally (App., *infra*, 11a-12a; see *Corona-Sanchez*, 291 F.3d at 1208-1209) on this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Taylor*, this Court held that the term "burglary," which is a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), refers to the "generic sense in which the term is now used in the criminal codes of most States, *Taylor*, 495 U.S. at 598, which must be determined by a "categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *id.* at 600. The Ninth Circuit reasoned that the "maximum term of imprisonment" must likewise be defined "categorically," by looking to "the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209. That extension of *Taylor* was erroneous.

This Court has applied *Taylor* to determine whether the *elements* of a crime fit a categorical definition in a statutory scheme. For example, in *Taylor*, the Court construed "burglary" in the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), to mean a "generic" form of the crime, and this Court then instructed courts to decide whether a particular state statute proscribed generic burglary by looking at the statute's elements, rather than at the particular conduct in which the defendant engaged. *Taylor*, 495 U.S. at 598, 600, 602. The Court, however, did not suggest that the "maximum" *penalty* for a crime should be determined by ignoring the maximum penalty to which a defendant was exposed as a result of a recidivist

enhancement. All *Taylor* requires is that courts refrain from looking to the "facts underlying" convictions. *Id.* at 600.

The Ninth Circuit erred in this case by going further and directing courts to ignore state law itself. App., *infra*, 11a (district court "could consider only the five-year maximum penalty"). But "nothing in *Taylor* suggests that [a court] must" "separate the recidivist enhancement from the underlying offense" and ignore the sentence authorized by state law. *Corona-Sanchez*, 291 F.3d at 1217 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). Consideration of a recidivist enhancement to a prior state offense does not require a federal sentencing court to delve into the defendant's past unadjudicated conduct. Rather, it requires consideration only of court documents that reveal how the defendant's prior criminal record affected the maximum punishment he faced. This does not create the "collateral trials" and "evidentiary disputes" that *Taylor* sought to forestall. *Shepard* v. *United States*, 544 U.S. 13, 23 & n.4 (2005) (permitting resort to judicial records in *Taylor* analysis to determine whether a plea-based conviction was for a generic crime).

Finally, the Ninth Circuit's analysis finds no support in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In *Corona-Sanchez*, the Ninth Circuit relied on this Court's statement in *Apprendi* that "recidivism 'does not relate to the commission of the offense,'" *Apprendi*, 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 244), and on the Court's holding in *Almendarez-Torres* that a recidivist enhancement "does not define a sepa-

rate crime." *Corona-Sanchez*, 291 F.3d at 1209 (citing *Almendarez-Torres*, 523 U.S. at 230, 239-247).

But those constitutional principles do not apply in the present context. *Almendarez-Torres* held that the fact of recidivism can be treated as a sentence enhancement, rather than as an element of an offense, and thus need not be charged in a federal indictment. *Apprendi* held that any fact other than recidivism that increases the otherwise-applicable maximum penalty is subject to the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment right to a jury trial. Those cases thus define procedural requirements that apply to facts other than prior convictions that raise a maximum sentence. They do not purport to define for statutory purposes under the ACCA what *is* the maximum sentence. The fact that, as a matter of constitutional law, recidivism need not be treated as an element of a separate crime does not detract from the reality that recidivists, like respondent, face a greater "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), than first offenders. Indeed, if anything, *Almendarez-Torres* makes clear that recidivism is an entirely permissible basis for a sentence enhancement even when it is *not* treated as an element of the crime. *Apprendi*, 530 U.S. at 488 (discussing *Almendarez-Torres*).[3]

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[3] Respondent has never contended in this case that the "maximum term of imprisonment" he faced under Washington law was defined by the upper end of the state sentencing guidelines range; rather, his sole contention was that recidivist enhancements could not be taken into account in determining the "maximum" penalty he faced. Accordingly, any such reliance on the guidelines maximum is waived.

In any event, ACCA's reference to the "maximum term of imprisonment * * * prescribed by law" should not be understood to refer to a

The Ninth Circuit's erroneous interpretation of this Court's precedent, which frustrates the federal interest

guidelines maximum that is lower than a statutory maximum. It is true that respondent's range under Washington's guidelines system was 43-57 months of imprisonment for each of his controlled-substance convictions in Washington. See C.A. Supp. E.R. 128-129, 147-148, 182-183. But the same judgments also state that the "[m]aximum [t]erm" he faced for each offense was ten years. *Ibid.* It does not matter that nearly a decade after entry of those judgments this Court held in *Blakely* v. *Washington*, 542 U.S. 296 (2004), that the "'statutory maximum' for *Apprendi* purposes" was the standard sentencing guidelines range, rather than the ten-year maximum authorized by statute for Blakely's felony. *Id.* at 303. *Blakely*'s use of the phrase "for *Apprendi* purposes," *ibid.*, made clear that the Court did not purport to establish the statutory maximum sentence for all purposes or for non-*Apprendi* purposes. *Blakely*, like *Apprendi*, speaks only to the *procedures* that must attend fact finding that raises a sentence above an otherwise-applicable maximum; it does not affect the statutorily established maximum term itself. And Congress, which enacted the pertinent language in the ACCA long before *Blakely* or *Apprendi*, see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207-39, undoubtedly focused its attention on the maximum term that state statutes authorized for an offense under any circumstances (regardless of the procedures needed to find the relevant facts). The courts of appeals that have addressed the issue have thus concluded that, in determining whether a prior conviction is for a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. 922(g)(1), "the maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines." *United States* v. *Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005) (rejecting the argument that *Blakely* affects the determination of the maximum potential sentence under 18 U.S.C. 922(g)(1)), cert. denied, 126 S. Ct. 1928 (2006); see *United States* v. *Harp*, 406 F.3d 242, 246-247 (4th Cir.) (*Apprendi* and *Blakely* pertain only to the "*process* by which the elements of [a] crime and other relevant facts must be determined," and do not prevent the defendant's prior drug crime from being punished by a prison term of more than one year) (quoting *United States* v. *McAllister*, 272 F.3d 228, 232 (4th Cir. 2001)), cert. denied, 126 S. Ct. 297 (2005).

in punishing recidivists who have proved to be a recurring threat to public safety, merits this Court's review.

2. The Ninth Circuit's holding that the ten-year maximum sentence authorized for each of respondent's prior convictions did not trigger the ACCA enhancement also conflicts with the decisions of other courts of appeals, as the Ninth Circuit itself acknowledged. See App., *infra*, 16a-17a n.6 ("We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003).").

In *Henton*, *supra*, the defendant, like respondent here, claimed that his prior state conviction for possessing with intent to deliver cocaine did not qualify as an ACCA predicate offense because the state statute generally provided that the offense was punishable by three to seven years of imprisonment. The Seventh Circuit rejected that argument because the statute separately provided, like Washington law here, that "any person convicted of a second or subsequent offense under this act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized." 374 F.3d at 469 (quoting Ill. Rev. Stat. ch. 56½, para. 1408(a) (1989)). The Seventh Circuit accordingly concluded that, "[b]ecause Henton was eligible for up to fourteen years' imprisonment, the district court properly concluded that the 1993 conviction qualifies as a 'serious drug offense' under ACCA." *Id.* at 470.

The Seventh Circuit recently reaffirmed its decision in *Henton*, explaining that:

> The [ACCA] inquires about the highest possible penalty. When Perkins continued selling cocaine despite his prior conviction, he exposed himself to a maximum of 14 years in prison. Federal law deems that a "serious" drug offense.

United States v. *Perkins*, 449 F.3d 794, 796 (7th Cir.), cert. denied, 127 S. Ct. 330 (2006). Thus, had respondent committed his federal offense within the Seventh Circuit, he would have received a minimum 15-year sentence under the ACCA, rather than the 92-month sentence imposed by the district court under *Corona-Sanchez*.

The Fifth Circuit likewise has expressly rejected the approach taken by the Ninth Circuit here. In *Mutascu*, *supra*, the Fifth Circuit held that a California conviction for petty theft constituted an aggravated felony "for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), because Mutascu was sentenced under the petty theft statute's recidivist sentencing provision to one year in prison. 444 F.3d at 711-712. In so holding, the Fifth Circuit expressly disagreed with *Corona-Sanchez*. *Id.* at 712 (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 577 n.3 (5th Cir. 2005) (also disagreeing with *Corona-Sanchez*), cert. denied, 126 S. Ct. 1142 (2006)). The Fifth Circuit specifically rejected the Ninth Circuit's attempt to "atomize[]" the theft sentence "into its predicate offense," while ignoring the alternative sentence authorized by statute and actually applied based on Mutascu's prior conviction. *Ibid.*

Finally, the Ninth Circuit's decision is in tension with the Fourth Circuit's analysis in *Williams*, *supra*. In *Williams*, the government argued that, by virtue of the defendant's first drug trafficking offense, his second offense (under New Jersey state law) subjected him to a sentence of up to ten years of imprisonment, and therefore qualified as an ACCA predicate offense. 326 F.3d at 538. The Fourth Circuit disagreed, but only because, under the relevant New Jersey law, Williams was not automatically eligible for the higher recidivist sentence. Eligibility for such a sentence depended upon the State's compliance with certain procedural protections with which the State had not complied. *Id.* at 538-539. The Fourth Circuit concluded that the ACCA does not "allow[] us to overlook a state's procedures in determining what constitutes a serious drug offense." *Id.* at 540.

The Fourth Circuit's reasoning strongly suggests that, where the fact of a prior conviction automatically subjects a defendant to an enhanced penalty or where the procedural steps necessary to trigger the enhanced penalty are satisfied, the "maximum term of imprisonment * * * prescribed by law" for the offense would include a recidivist sentence.

Because *Corona-Sanchez* is an en banc decision of the Ninth Circuit and because the Ninth Circuit denied the government's petition for rehearing en banc in this case, which called that court's attention to the inter-circuit conflict, Gov't Pet. for Reh'g 14-17, there is little prospect of the Ninth Circuit receding from its position and the circuit conflict being resolved without this Court's intervention.

3. The question of whether recidivist sentences for a prior offense may be considered in determining the

"maximum term of imprisonment prescribed by law" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), is a recurring and important question that merits an exercise of this Court's certiorari jurisdiction. The enhanced sentences prescribed by federal law for armed career criminals are an important law-enforcement tool in combating recidivist violent and drug-trafficking offenders, and, in the federal government's experience, the question whether a prior recidivist sentence triggers armed career criminal status arises with frequency.

Furthermore, as the *Corona-Sanchez* decision demonstrates, the same analytical question arises under the Sentencing Guidelines and immigration law. See 291 F.3d at 1203-1204; see also *Sanchez-Villalobos*, *supra* (Sentencing Guidelines); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (immigration); *United States* v. *Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (Sentencing Guidelines); *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (applying *Corona-Sanchez* in a Sentencing Guidelines case to the federal drug-possession statute, 21 U.S.C. 844), cert. denied, 538 U.S. 915 (2003).

The disparate enforcement of the ACCA in different federal circuits should be reconciled by this Court. Had respondent's case arisen within the Fifth or Seventh Circuit, his sentence would have been at least double the length that was imposed by the district court under *Corona-Sanchez*. Congress, by specifying lengthy minimum sentences for armed career offenders meeting certain criteria indicated a specific interest in ensuring that sentences for such offenders have a degree of uniformity. Such substantial inter-circuit disparity in federal sentences is hard to reconcile with that congressional

judgment and, in all events, merits this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-30397, 04-30494

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

Argued and Submitted: Jan. 23, 2006
Filed: Oct. 5, 2006

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Senior District Judge.

RAWLINSON, Circuit Judge:

A jury convicted Gino Rodriquez of being a felon in possession of a firearm. On appeal, he argues that the district court erred in denying his motion to suppress

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* The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

the firearm because consent to search was not voluntary. He also contends that there was insufficient evidence to support his conviction. On cross-appeal, the government maintains that the district court erroneously concluded that Rodriquez's prior drug convictions do not qualify as predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). We conclude that the search was conducted pursuant to a valid consent; there was sufficient evidence to support the jury's finding that Rodriquez possessed the firearm; and the district court—relying on *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) —correctly held that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA. We therefore affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Gino Rodriquez has several felony convictions in Washington State, including three convictions for delivery of a controlled substance. Rodriquez served his time and, upon his release, was placed on a term of community supervision, from which he absconded. He was subsequently placed on "escape status," and four warrants were issued for his arrest. His whereabouts were unknown until April 2003, when law enforcement officers located and arrested him.

Rodriquez was staying with Tammi Putnam in apartment 36 of an apartment complex in Spokane, Washington. Rodriquez had a key to the apartment, had access to the entire apartment, had his belongings there, and

received mail there. Rodriquez and Tammi resided with Tammi's daughter and teenaged son, Zachary.

In March 2003, Zachary's friend, William Packer, spoke to Rodriquez about "getting rid" of a gun. Rodriquez told Packer that he could "get rid" of it. Packer brought the gun to the apartment for Rodriquez. Rodriquez looked at the gun, grabbed it with his shirt, pulled the gun out of the sleeve and replaced it. Rodriquez kept the gun, telling Packer that he would try to sell it. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that he was "getting rid of it."

Meanwhile, a joint fugitive task force was looking for Rodriquez and conducting surveillance of Deanna Torgeson, whom the task force had learned was visiting Rodriquez on a regular basis. In April 2003, task force officers followed Torgeson to the apartment complex where Rodriquez resided. They observed Torgeson talking to Rodriquez right outside the rear, open door of apartment 36, while Rodriquez was eating a bowl of cereal.

Spokane County Sheriff Deputy Kris Thompson arrested Rodriquez pursuant to four outstanding warrants for his arrest. Deputy Thompson found a bag of heroin and approximately $900 dollars in cash when Rodriquez was searched. After Deputy Thompson administered the *Miranda* warnings, which Rodriquez waived, Rodriquez denied living in apartment 36. Rodriquez also made other statements that, according to Deputy Thompson, "didn't quite match up," including conflicting stories about how he arrived at the apartment.

At this point, Tammi arrived on the scene. When Deputy Thompson asked her whether she lived in apart-

ment 36 and whether she knew Rodriquez or Torgeson, she responded that she did not live in that apartment, she did not know Rodriquez or Torgeson, and she was at the complex to pick up her child. She then entered apartment 35.

After conversing with the resident of apartment 35, Deputy Thompson discovered that Tammi had not been forthright. He confronted Tammi with her earlier statements, which she confessed were false. He advised her that "it was a criminal offense to make a false or misleading statement to a public servant." During the course of their conversation, she seemed "nervous" and "upset." Deputy Thompson explained that Rodriquez had been arrested and told Tammi that a warrant could be obtained to search the apartment, in which case the apartment would be secured to ensure the integrity of its contents. Alternatively, she could consent to a search. Deputy Thompson informed Tammi that she had the right to refuse to consent and read to her a search consent card, which she reviewed, signed, and dated. Upon receiving her consent, the officers searched the apartment, where they discovered the gun underneath a couch.

Rodriquez was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He moved to suppress evidence seized during the search, asserting that Tammi's consent was not voluntary. The district court denied the motion, and Rodriquez was convicted by a jury.

Rodriquez also objected to the government's request that the judge enhance his sentence under the ACCA. He contended that his two prior burglary convictions and three prior drug convictions did not qualify as predi-

cate offenses under the ACCA. The district court concluded that Rodriquez's prior burglary convictions qualified as two predicate offenses; however, relying on *Corona-Sanchez,* the district court held that the ACCA enhancement did not apply because Rodriquez's prior drug convictions did not qualify as predicate offenses. This timely appeal and cross-appeal followed.

II

DISCUSSION

A. The Motion to Suppress Was Properly Denied Because Tammi Putnam Voluntarily Consented to the Search of Apartment 36

"We review de novo the district court's denial of a suppression motion. The district court's underlying factual finding that a person voluntarily consented to a search is reviewed for clear error." *United States* v. *Pang,* 362 F.3d 1187, 1191 (9th Cir. 2004) (citations omitted).

"It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible." *United States* v. *Soriano,* 361 F.3d 494, 501 (9th Cir. 2004) (citation and internal quotation marks omitted). "Whether consent to search was voluntarily given is to be determined from the totality of all the circumstances. It is the government's burden to prove that the consent was freely and voluntarily given. On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the fact-finder's decision." *Id.* (citations and internal quotation marks omitted).

"Our cases have identified five factors to be considered in determining the voluntariness of consent to a

search. They are: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained." *Id.* at 502 (citations and internal quotation marks omitted). "No one factor is determinative in the equation. It is not necessary to check off all five factors, but many of this court's decisions upholding consent as voluntary are supported by at least several of the factors. Nevertheless, these factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry." *Id.* (citations and internal quotation marks omitted).

Based on the totality of the circumstances and after considering the applicable factors, we conclude that Tammi voluntarily consented to the search. As to the first factor, the district court concluded, and Rodriquez conceded in his brief, that Tammi was not in custody when she consented to the search. Second, the court determined that there was no "indication that firearms were exhibited or drawn," a conclusion with which Rodriquez also agreed. Third, because Tammi was not in custody, "*Miranda* warnings were inapposite . . ." *Id.* at 504 (citation omitted). Fourth, the court found, and Rodriquez acknowledged, that Tammi knew she had the right to refuse consent. "Knowledge of the right to refuse consent is highly relevant in determining whether a consent is valid." *Id.* (alteration and citations omitted). Moreover, where, as here, "*the officers themselves* informed [Tammi] that she was free to withhold her consent," "the probability that their conduct could reasonably have appeared to her to be coercive" is "substantially lessened." *United States v. Mendenhall*, 446 U.S.

544, 559, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (emphasis added).

Fifth, Deputy Thompson told Tammi that, if she chose not to consent, he could apply for a search warrant and secure her apartment. A "statement indicating that a search warrant would likely be sought and the [apartment] secured could not have, by itself, rendered [Tammi's] consent involuntary as a matter of law." *United States v. Whitworth*, 856 F.2d 1268, 1279 (9th Cir. 1988) (citations omitted). Rather, application of this factor "hinges on whether [Tammi was] informed about the possibility of a search warrant in a threatening manner." *Soriano*, 361 F.3d at 504 (citations omitted). "Even assuming, however, that [Deputy Thompson's statements] were made in a threatening manner so as to imply the futility of withholding consent, when probable cause to justify a warrant exists, the weight of the fifth factor is significantly diminished." *Id.* at 504-05 (citations omitted).

Probable cause to justify a warrant existed in this case. "Probable cause exists when there is a fair probability or substantial chance of criminal activity. It is well-settled that the determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search." *Id.* at 505 (citations and internal quotation marks omitted).

Prior to the search, the officers knew the following: Rodriquez had absconded from his supervision, and there were four outstanding warrants for his arrest; he was found standing right outside an open door to an apartment eating a bowl of cereal; he denied residing at the apartment, but two people independently confirmed that he resided there; he provided an implausible expla-

nation for how he arrived at the apartment; he attempted to distance himself from the apartment; and he was in possession of "a considerable size chunk of heroin" and approximately $900 dollars in cash. This collection of facts implies a fair probability of criminal activity resulting in probable cause, thereby significantly diminishing the weight of the fifth factor. See *id.*

The voluntary consent analysis does not automatically end here, however, because the five factors articulated in *Soriano* are not exhaustive. *Id.* at 502. In addition to the five factors, "execution of a consent form is one factor that indicates that consent was voluntary." *United States v. Childs*, 944 F.2d 491, 496 (9th Cir. 1991) (alteration and citation omitted). In this case, Tammi executed a consent form, reinforcing the conclusion that she voluntarily consented.

In sum, the totality of the circumstances in this case leads us to conclude that the district court's finding that Tammi voluntarily consented to the search was not clearly erroneous. We therefore affirm the district court's denial of Rodriquez's motion to suppress.

B. There Was Sufficient Evidence to Support the Jury's Finding that Rodriquez Possessed the Firearm

"When reviewing convictions for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Sanders*, 421 F.3d 1044, 1049 (9th Cir. 2005) (emphasis in the original) (citation and internal quotation marks omitted).

The evidence in the record reflects that Packer asked Rodriquez whether Rodriquez could "get rid" of the gun for him. Rodriquez responded that he could. Packer brought the gun to Rodriquez, who looked at the gun and handled it. After telling Packer that he would try to sell it, Rodriquez kept the gun. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that "he was getting rid of it."

The evidence also supports a reasonable inference that Rodriquez resided in the apartment in which the gun was discovered: officers observed Rodriquez standing outside an open door to the apartment eating a bowl of cereal; although he denied residing in the apartment, two people independently confirmed that he resided there; he had a key to the apartment; he had access to the entire apartment; he had belongings in the apartment; and officers found mail sent to Rodriquez at the apartment's address.[1]

We conclude that the evidence at trial, viewed in the light most favorable to the prosecution, could lead a rational trier of fact to find beyond a reasonable doubt that Rodriquez possessed the firearm. See *United States v. Garcia-Cruz*, 978 F.2d 537, 542 (9th Cir. 1992)

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[1] The fact that the gun was located under the couch "where numerous individuals had access and control" does not establish that Rodriquez did not have possession of it; the evidence still reasonably supports the inference that he did. Rodriquez provided an implausible explanation for how he arrived at the apartment, denied living in the apartment, and stated that "he didn't have any belongings in apartment # 36," all of which could lead a rational trier of fact to conclude beyond a reasonable doubt that he was attempting to distance himself from the apartment because he was aware that he had put the gun under the couch.

(holding that the defendant's sole admission that he had "the gun dropped off to [him] to pick up" was sufficient evidence of possession).

C. Corona-Sanchez Forecloses Use of Rodriquez's Prior Drug Convictions as Predicate Offenses Under the ACCA

We review *de novo* whether a prior conviction "may be used for purposes of enhancement under the ACCA . . ." *United States* v. *Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998).

Under the ACCA, a person who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony" or a "serious drug offense" is subject to a mandatory minimum sentence of fifteen years. 18 U.S.C. § 924(e)(1). One definition of a serious drug offense is "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which *a maximum term of imprisonment of ten years or more* is prescribed by law . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Rodriquez was previously convicted of three drug offenses in violation of Washington Revised Code § 69.50.401, the maximum penalty for which is five years' imprisonment. Wash. Rev. Code § 9A.20.021(1)(c). However, if a person is convicted of "a second or subsequent offense," the maximum penalty is ten years. Wash. Rev. Code § 69.50.408(1). The question, then, is whether the district court should consider the maximum penalty as provided in the five-year statute of conviction (which would *not* trigger the ACCA enhancement), or consider the maximum ten-year penalty resulting from

the recidivism provision (which *would* trigger the ACCA enhancement).[2] The district court correctly applied our decision in *Corona-Sanchez,* concluding that it could consider only the five-year maximum penalty provided in the statute of conviction.

In *Corona-Sanchez,* we considered a similar issue: whether a defendant's prior conviction for petty theft under California Penal Code § 484(a) qualified as an "aggravated felony." 291 F.3d at 1208. To qualify as an aggravated felony, the term of imprisonment for the theft offense had to be at least one year. *Id.* On the face of California Penal Code § 484(a), the maximum possible sentence was six months. *Id.* However, the defendant "actually received a two year sentence . . . due to the application of California Penal Code § 666, which provides a sentence enhancement for recidivists." *Id.*

In deciding *Corona-Sanchez,* we followed the "familiar analytical model constructed by the Supreme Court in *Taylor v. United States,* 495 U.S. 575, [600] [, 110 S. Ct. 2143, 109 L. Ed. 2d 607] (1990)." *Id.* at 1203. For federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, "we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements."[3] *Id.* at 1209 (reiterating that the court

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[2] Neither party challenges the district court's determination that Rodriquez's two prior burglary convictions qualify as two predicate offenses under the ACCA. The only issue is whether Rodriquez's prior drug convictions qualify as predicate offenses.

[3] In general, federal courts apply this categorical approach to decide whether a defendant's prior conviction qualifies as a particular type of predicate offense (e.g., an "aggravated felony" or a "serious drug of-

must examine the crime itself, "rather than any sentencing enhancements"); *see also United States v. Moreno-Hernandez*, 419 F.3d 906, 910 (9th Cir. 2005) (stating that, in *Corona-Sanchez*, the court held that "the substantive offense is to be considered independently of any recidivist sentencing enhancement."), *cert. denied*, —U.S.—, 126 S. Ct. 636, 163 L. Ed. 2d 515 (2005). We observed that this conclusion "is consistent with the Supreme Court's historic separation of recidivism and substantive crimes. As the Court bluntly put it, 'recidivism does not relate to the commission of the offense.'" *Corona-Sanchez*, 291 F.3d at 1209 (citations omitted).

The rationale articulated in *Corona-Sanchez* applies equally in this case,[4] dictating the conclusion that the district court could consider only the maximum penalty as provided in the five-year statute of conviction, and not the maximum ten-year penalty resulting from the recidivism provision.

The government attempts to distinguish *Corona-Sanchez* on several bases, none of which are persuasive. The government first posits that, unlike *Co-*

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fense"), which, in turn, determines whether the defendant will receive an enhanced sentence. To decide whether a prior conviction counts as a particular type of predicate offense under the categorical approach, "federal courts do not examine the facts underlying the prior offense, *but look only to the fact of conviction and the statutory definition of the prior offense.*" *Corona-Sanchez*, 291 F.3d at 1203 (emphasis added) (citation and internal quotation marks omitted). In *Corona-Sanchez*, we concluded that the categorical approach required us to "separate the recidivist enhancement from the underlying offense" and "consider the sentence available for the crime itself . . ." *Id.* at 1209-10.

[4] "We apply the categorical approach in a variety of sentencing contexts." *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006) (citation and internal quotation marks omitted).

rona-Sanchez, where the petty theft statute (Cal. Penal Code § 484) and the recidivism provision (Cal. Penal Code § 666) were "wholly separate," the statutes in this case "are both in the same article . . . and are codified in fairly close proximity . . ." However, this distinction is not convincing because, in *Corona-Sanchez*, we concluded that "we must separate the recidivist enhancement from the underlying offense." *Corona-Sanchez*, 291 F.3d at 1210. We "must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. We observed that our conclusion is consistent with, and based on, the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes. *Id.* This rationale applies regardless of where the recidivist provision is located in the statutory framework. *Cf. United States v. Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (relying on *Corona-Sanchez* to disregard a sentencing enhancement located in the same section as the substantive offense).[5]

The government next argues that, in *Corona-Sanchez*, the issue was whether the defendant's prior conviction was for a "theft offense . . . for which the term of imprisonment is at least one year." *Corona-Sanchez*, 291 F.3d at 1204 (alteration, citation, and footnote reference omitted). The "theft offense" language, the government continues, suggests that Congress sought to include "only the punishment imposed for the theft of-

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[5] The government concedes that "the logic of *Corona-Sanchez* does not appear to be confined to separately codified sentencing schemes . . ."

fense itself." In contrast, according to the government, the issue in this case is whether Rodriquez's prior drug convictions were for "an offense . . . *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). The government contends that the language defining drug offenses is "more expansive and encompasses recidivist offenses . . ."

The government's reliance on the "theft offense" characterization is misplaced, however, because *Corona-Sanchez* did not rely on or attach any particular significance to that term. Rather, *Corona-Sanchez* focused on *the term of imprisonment for the theft offense* in determining whether a conviction for theft qualified as an aggravated felony. *See* 291 F.3d at 1208.

By urging us to conclude that the term "involving" is so broad as to "encompass[ ] recidivist offenses," the government is, in effect, contending that the drug offenses should be interpreted as subsuming corollary recidivism enhancements. That interpretation would effectively render "offense" and "sentencing enhancements" coterminous, a result that is foreclosed by Supreme Court precedent. *See Apprendi v. New Jersey*, 530 U.S. 466, 488, 496, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[R]ecidivism does not relate to the commission of the offense.") (internal quotation marks omitted); *see also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) ("[S]entence enhancements . . . do not describe substantive criminal offenses . . .") (internal quotation marks omitted) (citing *Corona-Sanchez*, 291 F.3d at 1211); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (holding that California Vehicle

Code § 23175 [now § 23550, which provides an enhanced penalty for successive convictions for driving under the influence of alcohol,] "is an enhancement statute; it does not alter the elements of the underlying offense.") (citation omitted).

Finally, the government postulates that *Corona-Sanchez* applies only where the underlying offense is a misdemeanor and applying the recidivism provision would transform the misdemeanor into a felony. Because Rodriquez's prior drug offenses are already felonies, the government maintains, *Corona-Sanchez* does not apply, and the district court should have considered the maximum penalty applying the recidivism provision.

We disagree. *Corona-Sanchez* applies irrespective of the nature of the underlying crime of which a defendant is convicted. In *Corona-Sanchez*, we held that "a crime may be classified as an 'aggravated felony' . . . without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." 291 F.3d at 1210 (emphasis in the original). In so holding, we agreed with our sister circuits that "it is irrelevant whether the state labels the underlying crime 'misdemeanor' or 'felony'. . . . The relevant question is whether the crime meets the definition of an 'aggravated felony' under federal sentencing law." *Id.* (citation and footnote reference omitted).

Likewise, Rodriquez's three convictions for delivery of a controlled substance may be classified as "serious drug offenses" "without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." *Id.* As articulated in *Corona-Sanchez*, "it is irrelevant" whether Rodriquez's underlying crimes are misdemeanors or felonies; the relevant question is whether his

prior drug offenses meet the definition of a "serious drug offense." *Id.* Under *Corona-Sanchez*, whether application of a recidivism enhancement would transform a misdemeanor into a felony is simply of no import.

However the government frames its argument, the essence of its request is that we consider the offense and the sentencing enhancement together. But that is precisely what is forbidden by *Corona-Sanchez* and its progeny. *See Moreno-Hernandez*, 419 F.3d at 911 ("*Corona-Sanchez* explained the cleaving of the recidivist enhancement from the underlying offense largely on the basis that the enhancement was measured by recidivism. Following the Supreme Court's reiteration . . . that 'recidivism does not relate to the commission of the offense,' the en banc court regarded petty theft as a single, substantive offense, as to which various sentencing alternatives were available depending on the defendant's past criminal history.") (citations and emphasis omitted).

In sum, the government's distinctions cannot overcome the language in, or the rationale of, *Corona-Sanchez*. Based on *Corona-Sanchez*, the district court properly concluded that it could consider only the five-year maximum penalty provided in the statute of conviction. Because Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA, the district court correctly declined to apply that enhancement.[6]

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[6] We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth

III

CONCLUSION

Because Tammi Putnam voluntarily consented to the search of apartment 36, the motion to suppress the firearm was properly denied. There was sufficient evidence presented during trial to enable a rational jury to conclude beyond a reasonable doubt that Rodriquez possessed the firearm. *Corona-Sanchez* applies in this ACCA case, dictating the conclusion that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA.

AFFIRMED

Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003). Nevertheless, *Corona-Sanchez* is binding Ninth Circuit precedent and dictates the conclusion we reach.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CR-03-142-RHW

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIQUEZ, DEFENDANT

[Filed Sept. 03, 2004]

SENTENCING ORDER

A sentencing hearing was held on September 2, 2004, in Spokane, Washington. Defendant was convicted by jury trial to one Count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). Defendant objects to being classified as an Armed Career Criminal, arguing that his two prior California Convictions for Residential Burglary do not qualify as predicate offenses, nor do his three Spokane County drug convictions. This order memorializes the Court's oral ruling.

DISCUSSION

The Armed Career Criminal enhancement is found in both the United States Criminal Code and the United States Sentencing Guidelines. The statute provides that a person who violates § 922(g) (felon in possession of a firearm) and has three previous convictions for a violent felony or serious drug offense, committed on occasions

different from one another, shall receive a minimum 15-year sentence. 18 U.S.C. § 924(e)(1). "Serious drug offense" is defined as: (i) a federal offense under the Controlled Substance Act for which a maximum term of imprisonment of 10 years or more is prescribed by law; or (ii) a state offense involving the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance for which a maximum term of imprisonment of 10 years or more is prescribed by law. 18 U.S.C. § 924(e)(2)(A). A "violent felony means any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Under 4B1.4 of the United States Sentencing Guidelines, a defendant who meets the criteria of 18 U.S.C. § 924(e) is considered an Armed Career Criminal. U.S. Sentencing Guidelines Manual § 4B1.4 (2003).

In determining whether a particular prior offense qualifies as a predicate offense for the Armed Career Criminal enhancement, the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but "looks only to the statutory definitions of the prior offenses." *Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Wofford*, 122 F.3d 787, 792 (9th Cir. 1997). If the statute criminalizes conduct that would not constitute a "violent felony," the conviction may not be used for sentence enhancement, unless the record includes "documentation or judicially noticeable facts that clearly establish that

the conviction is a predicate conviction for enhancement purposes." *United States v. Potter*, 895 F.2d 1231, 1237 (9th Cir. 1990).

In *Taylor*, the Supreme Court held that the definition of burglary, as used in § 924(e), contains at least the following elements: (1) an unlawful or unprivileged entry into, or remaining in, a building or other structure, (2) with intent to commit a crime. 495 U.S. at 599. Thus, for purposes of a § 924(e) enhancement, if a person has been convicted of burglary, where the statutory definition of burglary includes the basic elements of unlawful or unprivileged entry into or remaining in, a building or structure, with intent to commit a crime, that conviction will qualify as a predicate offense in determining whether a person is an Armed Career Criminal for sentencing purposes.

A. California Convictions

In 1980 and 1982, Defendant was convicted of Residential Burglary in the Superior Court of Kings County, California. Although § 459 of the California Penal Code has been amended since 1980 and 1982, the basic definition of burglary has not changed. Section 459 provides that:

> Every person who enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Pen. Code § 459 (2004).

Courts interpreting § 459 of the California Penal Code have held that this statute does not qualify as a "violent felony" under the strict categorical approach

approved in *Taylor*. *United States v. Parker*, 5 F.3d 1322, 1324 (9th Cir. 1993). These courts then engaged in a "modified categorical" approach in which the courts looked at other documents and judicially-noticeable facts to determine whether the offense was within the Guidelines' definition. *Id.*; see also *United States v. Shumate*, 329 F.3d 1026, 1029 (9th Cir. 2003). If the statute, together with other documents and the judicially-noticeable facts, demonstrates that the defendants could have been "convicted of an offense other than that defined as a qualifying offense," the offense cannot be used to enhance defendant's sentence. *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004).

1. Defendant's 1980 California Conviction

The Government provided certified copies of documents relating to Defendant's 1980 conviction (Ct. Rec. 70, Attach. D), including the 1980 Amended Information and copies of the abstract of Defendant's arraignment, the State's motion to file the amended Information, Defendant's plea to the charged burglary, and the Commitment and Sentence.

The Amended Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, in the nighttime, enter the inhabited dwelling house of Ernest Filippi located at 1504 Middleton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1 as charged in the Amended Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which are the elements that make up the generic definition of burglary. The documents do not demonstrate that De-

fendant could have been convicted of an offense other than that defined as a qualifying offense. As such, Defendant's 1980 Calilfornia conviction qualifies as a predicate offense.

2. Defendant's 1982 California Conviction

The Government provided certified copies of documents relating to Defendant's 1982 conviction (Ct. Rec. 70, Attach. E), including the 1982 information and copies of the abstract of Defendant's bail reduction motion, Defendant's plea to the charged burglary, the Probation Office's Recommendation for an Aggravated Sentence, and the abstract of the Judgment imposed.

The Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, enter the inhabited dwelling house of M.W. Wolfe, located at 1209 N. Ridengton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1. Although the guilty plea did not specifically refer to the Information, it is implicit in the documents that Defendant was pleading to the charge contained in Count 1 of the Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which, like the 1980 conviction, are the elements that make up the generic definition of burglary. The documents do not demonstrate that Defendant could have been convicted of an offense other than that defined as a qualifying offense. As such, Defendant's 1982 California conviction qualifies as a predicate offense.

The Court finds that the 1980 and 1982 convictions qualify as predicate offenses for purposes of determining whether Defendant is an Armed Career Criminal.

B. Spokane County Convictions

On November 16, 1995, Defendant was convicted under three separate causes of actions for drug offenses that were related to a series of drug transactions that took place in March of 1994, and between October 1994 and January 1995. In each case, Defendant pleaded guilty to violating Wash. Rev. Code § 69.50.401. The maximum penalty for a violation of § 69.50.401 is five years. Under Washington law, however, if a person is convicted of "a second or subsequent offense" relating to narcotic drugs, the maximum penalty is 10 years. Wash. Rev. Code § 69.50.408.[1] This is referred to as the "doubling statute."

The question then is whether, when applying 18 U.S.C. § 924(e), the Court should consider the maximum penalty as provided in the statute of conviction, or consider the maximum penalty that is a result of a sentencing enhancement or doubling statute. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002), the Ninth Circuit, using the *Taylor* categorical approach, [2]

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[1] "(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

"(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." Wash. Rev. Code § 69.50.408 (2003).

[2] The Ninth Circuit has applied *Taylor's* categorical approach in a variety of sentencing contexts. *See, e.g., United States v. Martinez*, 232 F.3d 728-33 (9th Cir. 2000) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir.

addressed a similar issue in determining whether a California conviction for petty theft constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Id.* In that case, the defendant's conviction of petty theft carried a maximum penalty of six months.[3] *Id.* at 1207. Under the Sentencing Guidelines, a defendant's prior conviction for petty theft would qualify as an aggravated felony if the term of imprisonment was at least one year. 8 U.S.C. § U.S.C. 1101(a)(43)(G). The defendant, however, received a two-year sentence, due to the application of California Penal Code § 666, which sets forth a sentence enhancement for recidivists.[4] *Id.* In applying the *Taylor* categorical approach, the Circuit separated the recidivist enhancement from the underlying offense, and only considered the maximum possible sentence for the offense of conviction. *Id.* at 1210 ("*Taylor* required us to examine the prior crimes by considering the statutory definition of the crimes categorically, without refer-

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2000) (aggravated felony pursuant to U.S.S.G. § 2L1.2(b)(1)(A)); *United States v. Sandoval-Barajas*, 206 F.3d 853, 855-56 (9th Cir. 2000) (same); *United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (predicate offense under the Armed Career Criminal Act).

[3] Although it was not clear in the presentence report, the Circuit concluded that the defendant was convicted of violating California Penal Code § 484(a), which is the general California theft statute. *Id.* at 1206.

[4] Section 666 provides: "Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison."

ence 'to the particular facts underlying those convictions.'") (citations omitted) The Circuit concluded that, on its face, the statute defining the crime of petty theft did not qualify as an aggravated felony under the federal sentencing law. *Id.* at 1211. In rejecting the Government's argument that the defendant's conviction for petty theft qualified as an aggravated felony, the Circuit stated that "under the categorical approach, we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209.

The Court does not see any distinction between the application of § 666 of the California Penal Code to a violation of § 484(a) and the application of Wash. Rev. Code § 69.50.408 to a violation of §69.50.401. In both cases, the application of the separate sentencing statute[5]

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[5] The Court notes that, in an unpublished opinion with a somewhat similar scenario, the Circuit reached a different result. See *United States v. Perez*, 2002 WL 31808370 (9th Cir. Dec. 11, 2002). In that case, the Circuit concluded that because the statutory scheme mandated a sentence in excess of one year for a repeat vehicle theft offender, the prior conviction for a theft offense qualified as an aggravated felony. *Id.* at *1. There, however, the crime of conviction, California Penal Code § 10851, fit within the "generic sense in which the term [theft offense] is now used in a criminal code of most States." *Id.* In addition, § 10851 provided for a penalty enhancement for repeat offenders, which increased the maximum penalty beyond the required year. *Id.* Contrast that case to the present case, as well as to another unpublished opinion where the sentencing enhancements are found in separate sections of the criminal code and are not referenced by the statute of conviction. See *Contreras-Castillo v. Ashcroft*, 2003 WL 21153490 (9th Cir. May 16, 2003). In *Contreras-Castillo*, the Circuit reiterated its rule established in *Corona-Sanchez* that only the statute of conviction should be considered without reference to other provisions that enhance the permissible and imposed sentence. *Id.* at *1.

does not alter the maximum sentence available for the crime itself. In this case § 69.50.401 does not qualify as a predicate offense because the maximum term of imprisonment for violation of this statute does not meet the statutory definition of a predicate offense, as defined in the United States Code. 18 U.S.C. § 924(e) states that a "serious drug offense" is one that involves the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law.

Here, § 69.50.401 states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, and sets the maximum term of imprisonment at five years. Wash. Rev. Code § 69.50.401. Thus, on its face, the statutory definition of Defendant's prior drug offenses do [*sic*] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement. Accordingly, under *Corona-Sanchez*, the Court need look no further. See *Corona-Sanchez*, 291 F.3d at 1213 ("[E]ven if the relevant documents were to establish the substantive elements of the generic crime, the offense of which [defendant] was convicted would still not constitute an aggravated felony because it fails to meet the one-year sentence requirement of § 1101(a)(43)(G).").

The Government argues that § 69.50.408 is neither discretionary nor a sentence enhancement but, rather, is a provision that automatically doubles the statutory maximum sentence for convictions under § 69.50 when the defendant has a second or subsequent conviction under that statute. Even if the Government does not want to call § 69.50.408 a sentencing enhancement, it

clearly is meant to address the issue of recidivism. As the Supreme Court clearly stated, "recidivism does not relate to the commission of the offense." *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 230, 239-47 (1998) (concluding that a penalty provision that authorizes a court to increase the sentence for a recidivist does not define a separate crime). The Government's labeling of the statute as non-discretionary and not a sentencing enhancement does not affect the analysis. Indeed, in *Corona-Sanchez*, § 666 of the California Penal Code could arguably be categorized as a non-discretionary sentencing statute. Even so, the Circuit declined to consider this section when determining whether a predicate offense qualified as an aggravated felony.

In sum, Defendant's two prior California convictions for residential burglary do qualify as predicate offenses under the Armed Career Criminal enhancement. In order for the enhancement to apply, however, Defendant must be convicted of three qualifying predicate offenses. Because the Washington convictions do not meet the statutory definition of a predicate offense, the Armed Career Criminal enhancement should not be applied in this instance.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel and U.S. Probation.

DATED this 3 day of September 2004.

/s/ ILLEGIBLE
ROBERT H. WHALEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-30397
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

No. 04-30494
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

[Filed: Jan. 12, 2007]

ORDER

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Chief District Judge.

The panel has voted to deny the petition for rehearing en banc.

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* The Honorable Consuelo Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing en banc filed on November 20, 2006, is DENIED.

APPENDIX D

STATUTORY PROVISIONS

1. Section 924(e) of Title 18 of the United States Code (2000 & Supp. IV 2004), provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which

a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

2. Section 69.50.401 of the Revised Code of Washington (1994) provides:

Prohibited acts: A—Penalties

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this section with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars, for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not

more than five years, fined not more than ten thousand dollars, or both;

(b) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) any other counterfeit substance classified in Schedule, I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a counterfeit substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(c) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other

liquid, substance or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(ii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021.

3. Section 69.50.408 of the Revised Code of Washington (1994) provides:

Second or subsequent offenses

(a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under RCW 69.50.401(d).